85-1078

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

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QUESTIONS PRESENTED

1. Whether the assertion of personal jurisdiction over a nonresident individual who had no personal contacts with the State of Texas, but was merely an attorney and shareholder in a Florida law firm organized as a professional association, and had no knowledge or control over the actions of another employee of the professional association, whose sole contact with the State of Texas was his participation in settlement negotiations in Texas, on behalf of a Florida corporate client, with a Texas attorney, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a defendant's due process right to contest personal jurisdiction may constitutionally be deemed to have been waived, based solely upon the defendant's attempt to secure compliance with court ordered discovery and his filing of a response to a motion filed by the plaintiff, when the defendant has entered a limited and special appearance and the trial court has ordered that a trial on the merits must commence immediately after the conclusion of the jurisdictional hearing.

PARTIES

Petitioner Zayle A. Bernstein, one of the defendant-
ppellees below, is an individual. He is a citizen and resi-
ent of the State of Florida and is licensed to practice
aw in that jurisdiction. Respondent Portland Savings and
oan Association, plaintiff-appellant below, was a savings
nd loan association organized and incorporated under the
aws of Texas. During the course of the proceedings below,
ortland was merged into Charter Savings and Loan As-
ociation, also a savings and loan association organized and
ncorporated under the laws of Texas.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

Petitioner Zayle A. Bernstein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Appeals entered in this proceeding on February 21, 1985.

OPINIONS BELOW

On September 26, 1983 the 148th Judicial District Court of Nueces County, Texas rendered an oral decision granting Zayle A. Bernstein's plea to the jurisdiction and dismissing Respondent's case for lack of personal jurisdiction. The trial court's judgment order was entered the following day. App. 1-2.[1] The trial court filed written findings of fact and conclusions of law on October 22, 1983. App. 3-6.

[1] "App." refers to the Appendix to this Petition. "Tr." refers to the transcript of the jurisdictional hearing and "R." refers to the record of pleadings on appeal. "Supp. R." refers to the supplement record on appeal.

In an opinion delivered on November 29, 1984, the Court of Appeals for the Thirteenth Supreme Judicial District at Corpus Christi, Texas reversed the judgment of the trial court. On February 21, 1985, after Petitioner had filed a motion for rehearing, the Court of Appeals vacated its original opinion and filed a new opinion, once again reversing the trial court.[2] App. 7-24. A second motion for rehearing was denied on March 14, 1985. App. 25-26.

Petitioner filed an application for writ of error with the Texas Supreme Court on April 15, 1985. The Texas Supreme Court denied the application without opinion on July 17, 1985. App. 27. Petitioner's motion for rehearing was denied on September 18, 1985. App. 28-29.

JURISDICTION

The decision of the Texas Court of Appeals which warrants review by this Court was entered on February 21, 1985. The Texas Supreme Court denied Petitioner's timely application for writ of error on July 17, 1985 and denied Petitioner's motion for rehearing on September 18, 1985. This petition is being docketed in this Court within 90 days of the Texas Supreme Court's denial of rehearing. This Court has jurisdiction, pursuant to 28 U.S.C. § 1257(3), because a final judgment has been rendered by the highest court in the State of Texas asserting personal jurisdiction over Petitioner in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Calder v. Jones*, ____ U.S. ____, 104 S.Ct. 1482, 1486, n.8 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195-196, n.12 (1977).

[2] This opinion is not published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes, art. 2031b, Sections 3, 4:

> Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.
>
> Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company,

association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Texas Rules of Civil Procedure, Rule 120a:

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

Florida Statutes, Section 621.07

621.07 *Liability of officers, shareholders, corporation, etc.* Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct; provided, however, that any officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered; and provided further that the personal liability of shareholders of a corporation organized under this act, in their capacity as shareholders of such corporation, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under chapter 608. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services.

STATEMENT OF THE CASE

Introduction

Petitioner Zayle A. Bernstein is a citizen and resident of the State of Florida. He is an attorney, licensed to practice law in the State of Florida, and, at all times relevant to this case, practiced law with and for DiGiulian, Spellacy & Bernstein, P.A., a corporation organized and operated pursuant to the provisions of the Florida Professional Service Corporation Act. *Fla. Stat. Ann.*, § 621.01 *et seq.* (West 1977). Petitioner was a shareholder in the professional association and it is his name referred to in the firm's title. (Tr. 93-94, 590).

Petitioner's brother, Sidney T. Bernstein, who was also an attorney, was an employee of DiGiulian, Spellacy & Bernstein, P.A.; he was never a shareholder in the firm. (Tr. 93-94, 592-594).[3] While employed by DiGiulian, Spellacy & Bernstein, P.A., one of the clients for whom Sidney T. Bernstein performed legal services was Legel Braswell Government Securities, Inc. ("Legel Braswell"), a Florida corporation with its principal place of business in Florida. (R. 391). Petitioner performed no legal services for Legel Braswell, and he had no control over, or even knowledge of, the services performed by his brother. (Tr. 330-331).

Respondent Portland Savings and Loan Association is the named plaintiff. However, Portland is no longer in existence as the result of a stock purchase agreement between certain Portland shareholders and Charter Savings

[3] Sidney T. Bernstein, now deceased, is named as a defendant in this case, but is not a petitioner in this Court.

and Loan Association and a subsequent merger agreement between the two associations. Portland was located in Portland, Texas. (Tr. 9, 47).

The Allegations In The Trial Court

On May 20, 1981, Respondent filed a Petition against Sidney T. Bernstein, the law firm of DiGiulian, Spellacy & Bernstein, P.A., and the individual shareholders in the law firm, including Petitioner. The Petition contained numerous allegations relating to Sidney T. Bernstein and various Legel Braswell personnel, but contained no allegation of any affirmative act by Petitioner. (R. 2-11).

On June 22, 1981 the defendants (including Petitioner) filed a special appearance, contesting personal jurisdiction. The special appearance asserted, among other things, that holding the defendants to the jurisdiction of the Texas courts would violate their due process rights under the Fourteenth Amendment to the United States Constitution. (R. 15-21).

Respondent filed its First Amended Original Petition in March 1982. The First Amended Petition acknowledged that DiGiulian, Spellacy & Bernstein, P.A. was a professional association, and, once again, contained no allegation of any personal wrongdoing by Petitioner. (R. 53-69). In May 1983, Respondent settled the case as to the law firm of DiGiulian, Spellacy & Bernstein, P.A. and the other individual shareholders for the sum of $14,000.00. (R. 98-99, 307). Apart from the allegation that Sidney T. Bernstein was the brother of Petitioner, the allegations against the other shareholders were identical to those against Petitioner. (R. 53-69). Despite the fact that the First Amended Original Petition contained no allegations of purposeful acts by Petitioner, Respondent did not settle with him.

On September 1, 1983, Respondent filed its Second Amended Original Petition against Petitioner and Sidney T. Bernstein. (R. 298-313).[4] In the Second Amended Petition, Respondent conceded that both defendants were nonresident individuals who neither maintained a place of business in Texas nor had any designated agent in Texas. The alleged basis for jurisdiction was that defendants were "doing business" in Texas pursuant to the Texas Long-Arm Statute. *Tex. Rev. Civ. Stat. Ann.*, art. 2031b (Vernon's 1964). Jurisdiction was purportedly based upon the following activities of Sidney T. Bernstein: (1) the attendance, at the invitation of Respondent's attorney, at a one-day settlement meeting in Corpus Christi, Texas; and (2) several telephone calls and letters between Sidney Bernstein and Texas residents, all of which were designed to facilitate a settlement agreement between Portland and Legel Braswell. It was alleged that Petitioner and Sidney Bernstein should be considered partners because they allegedly had held themselves out as such and were therefore estopped from denying their "partnership." There was no allegation that Petitioner had any contact with the State of Texas.

The Trial Court Pretrial Proceedings

After filing their special appearance, Petitioner and Sidney T. Bernstein attempted to obtain a hearing on their plea to the jurisdiction for over two years. The matter was set for hearing on numerous occasions. (R.

[4] Although the Second Amended Original Petition contains six counts, each of the counts is based on the underlying allegations which assert that Sidney T. Bernstein conspired with his client, Legel Braswell, to defraud Respondent and to convert Government National Mortgage Association ("GNMA") securities belonging to Respondent.

32, 36, 86, 90, 100). However, Respondent repeatedly obtained continuances on the ground that it needed to conduct additional discovery. (R. 34-35, 85). Petitioner and Sidney T. Bernstein also tried to have discovery limited to the question of jurisdiction. (R. 38, 42-43, 411). Respondent objected and repeatedly insisted on obtaining full discovery before proceeding with a jurisdictional hearing, and the trial court ordered that discovery be conducted on both the question of jurisdiction and the merits of the suit. (R. 38, 48-49, 51-53, 71-72, 217).

Respondent proceeded to conduct extensive discovery. A large portion of this discovery was directed to the merits of the case. Many documents were produced by the defendants, as ordered by the court, and Sidney T. Bernstein was deposed for six days. Respondent never sought to depose Petitioner.

On September 13, 1983, the trial court set the jurisdictional hearing for September 19, 1983. (R. 354). A trial on the merits, if necessary, was to follow immediately. Faced with the prospect of imminent trial, Petitioner and Sidney T. Bernstein also sought discovery. When Respondent refused to comply, they sought, and obtained, orders compelling discovery. (Supp. R. 83-86). These court orders notwithstanding, Respondent persisted in its refusal to comply with discovery and on September 19, 1983, the day the jurisdictional hearing commenced, Petitioner and Sidney T. Bernstein filed a motion for sanctions. (R. 361-364).

On September 13, 1983, Respondent filed a motion for determination of its counsel's status, that is, seeking an order to permit its counsel to testify for as well as represent Respondent. (R. 355-356). Two days later, Petitioner and Sidney T. Bernstein filed a response, which noted that the Texas Code of Professional Responsibility prohibited

a lawyer from both testifying for and representing a party. (R. 357-359). The trial court allowed Respondent's motion. (R. 360).

The jurisdictional hearing commenced on September 19, 1983. During the course of the jurisdictional hearing a jury was selected and impaneled for the trial on the merits, in the event that the jurisdictional plea was denied. Petitioner and Sidney Bernstein objected to such selection, but were overruled and assured by the trial court that such selection would not prejudice their special appearance.

The Trial Court Jurisdictional Hearing

The trial court conducted a six-day hearing on the jurisdictional issue. During the entire hearing, which produced almost 1,100 pages of testimony, Respondent presented no evidence of any action taken by Petitioner. Indeed, Respondent made no attempt to establish that Petitioner had engaged in any purposeful contact with the State of Texas. Only eight pages mention Petitioner and none of these establish any contact, tie or relation to the State of Texas. (Tr. 93-94, 329-331, 590-591, 1021).[5]

Respondent also failed to produce evidence that Sidney T. Bernstein and Petitioner practiced law as a partnership. The uncontradicted evidence established that: (1) DiGiulian, Spellacy & Bernstein, P.A., was a professional association organized and operated under the laws of the State of Florida (Tr. 93, 589-590, DX 2, DX 3); (2) that

[5] Sidney T. Bernstein testified that Petitioner was a shareholder in DiGiulian, Spellacy & Bernstein, P.A. and had no knowledge of or control over work relating to Legel Braswell. (Tr. 93, 330-331) Bruno DiGiulian testified that Petitioner worked in the law firm. (Tr. 590-591) The only mention of Petitioner in the Respondent's case was that he was Sidney Bernstein's brother. (Tr. 1021).

Petitioner was a shareholder in the professional association (Tr. 93, 590); and (3) that Sidney T. Bernstein was not a shareholder, but merely an employee of the law firm. (Tr. 93-94, 592-594).

Recognizing that there had been no testimony relating to any activity by Petitioner, the trial judge stated in his oral decision that there was "no proof whereby any judgment of this court could be entered against [Petitioner]." (Tr. 1085). In his written findings of fact, the trial court held that (App. 3-5):

> [Petitioner] was, at all times relevant to the matters in this case, and is a resident of the State of Florida;
>
> DiGuilian, Spellacy & Bernstein, P.A. was at all times relevant hereto, a corporation organized and operated pursuant to the provisions of the Florida Professional Service Corporation Act. West's F.S.A., *Sec.* 621. DiGuilian, Spellacy & Bernstein, P.A. did not maintain any office or agent in the State of Texas and did not hold itself open for the rendering of legal services to residents in the State of Texas;
>
> [Petitioner] did not perform any legal services or provide any advice to Legel Braswell, nor did he supervise or control Sidney T. Bernstein or any lawyer who did provide legal services to Legel Braswell; and
>
> [Petitioner] had no correspondence or contact with any officer, agent, employee or representative of Portland and no contact with or physical presence in the State of Texas.

In light of these factual findings, the trial court granted Petitioner's plea to the jurisdiction on state statutory as well as federal constitutional grounds. The trial court held that (App. 6):

> [Petitioner was not] engaged in business in the State of Texas and [was] therefore not subject to the jurisdiction of this Court under the Texas Long-Arm Statute, Vernon's Ann. Civ. Sta., art. 2031b.

> The assertion of jurisdiction by this Court over . . . [Petitioner] would be in violation of the due process requirements of the United States Constitution.

The Appellate Court Proceedings

The Texas Court of Appeals, ignoring the trial court's findings of fact, ruled that the Texas courts had personal jurisdiction over Petitioner. The Court of Appeals conceded that "[t]here is no evidence that [Petitioner] had direct contacts which would subject him to the jurisdiction of the Texas courts." App. 16. Further, the Court of Appeals did not overrule any of the trial court's findings of fact, including the finding that DiGiulian, Spellacy & Bernstein, P.A. was a professional association, rather than a partnership. Nonetheless, without even addressing the due process implications of its decision, the Court of Appeals asserted jurisdiction over Petitioner.

Although the undisputed evidence established that DiGiulian, Spellacy & Bernstein, P.A. was a professional association (as Respondent had actually conceded in earlier pleadings),[6] the Court of Appeals held that Petitioner "did not meet [his] burden of proving that [he] and Sidney Bernstein were not partners." App. 18. The appellate court asserted, *ipse dixit*, that subjecting Petitioner "to the jurisdiction of the Texas courts does not offend traditional notions of fair play and substantial justice." App. 18.

The Court of Appeals also ruled that Petitioner (despite the fact that he was ordered to be ready for a trial on the merits immediately following the jurisdictional hearing) had waived his right to contest personal jurisdiction merely by attempting to secure discovery for use at that

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[6] *See* R. 53-69, 98-99.

imminent trial and by filing a response to a motion filed by Respondent.

The Texas Supreme Court denied Petitioner's application for writ of error, without opinion, and subsequently denied Petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the power of a state court to assert personal jurisdiction over a nonresident defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Kulko v. California Superior Court*, 436 U.S. 84, 91 (1978). For jurisdiction to be upheld, as this Court repeatedly has held, there must be proof of meaningful contacts between the defendant and the forum state. *International Shoe v. Washington*, 326 U.S. 310, 319 (1945); *Burger King Corp. v. Rudzewicz*, ___ U.S. ___, 105 S.Ct. 2174, 2183 (1985). The assertion of jurisdiction over Petitioner ignores this constitutional requirement and directly conflicts with the decisions of this Court.

Purposeful contacts by Petitioner cannot be established simply by referring to conduct by Sidney T. Bernstein, Petitioner's brother and an employee in Petitioner's law firm. The undisputed evidence established that the law firm was incorporated as a professional association under the laws of the State of Florida, and that Petitioner had no knowledge or control over the actions of his brother. Asserting jurisdiction in these circumstances conflicts with this Court's prior rulings that jurisdiction cannot be es-

tablished by the activity of another party or a third person. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, ____ U.S. ____, 104 S.Ct. 1868, 1873 (1984). Jurisdiction is proper only when the actions of the defendant himself create a "substantial connection" with the forum State. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

The assertion of jurisdiction over Petitioner raises serious and far-reaching questions relating to jurisdictional amenability. This case is yet another case in which the Texas courts have chosen to ignore the federal constitutional limitations upon their jurisdiction for the simple reason that those constitutional limitations are a vexing impediment to their own attempts to expand their jurisdiction. *See, Helicopteros Nacionales de Colombia, S.A. v. Hall*, ____ U.S. ____, 104 S.Ct. 1868 (1984). This case is especially worthy of review by this Court, however, because, in this case, a state court has based jurisdiction solely upon an individual's ownership interest in a corporation. Unless this incipient and pernicious jurisdictional theory is expressly disapproved by this Court, shareholders through the country will be towed to the jurisdiction of far away courts attempting to expand their reach. That result could threaten the very fabric of our economic system.

In addition, the Court should grant the petition in order to address an important question on waiver of a constitutional right. Assertion of jurisdiction over Petitioner, based on his purported "waiver," conflicts with prior decisions of state and federal courts holding that a nonresident defendant who has properly contested jurisdiction must be allowed to file necessary, subsequent pleadings without being deemed to have waived his constitutional rights. *World-Wide Volkswagen Corp. v. Woodson*, 444

U.S. 286, 245, n.10 (1980); *Hasley v. Black, Sivalls & Bryson, Inc.*, 235 N.W.2d 446, 452, 70 Wis.2d 562 (1975).

Moreover, this Court should decide whether a state court, by ordering a trial on the merits to commence immediately after a jurisdictional hearing, can force a nonresident defendant to choose between preparing his case on the merits and exercising his constitutional right to contest jurisdiction. A decision by this Court on the question of whether a defendant facing an imminent trial must forego discovery in order to preserve his jurisdictional objection is of great importance to the lower courts, to parties, and to lawyers throughout the country who are, or will be, faced with this difficult choice.

I.

THE ASSERTION OF JURISDICTION OVER ZAYLE A. BERNSTEIN, WHO HAD NO PERSONAL CONTACTS WITH THE STATE OF TEXAS, AND NO CONTROL OVER HIS BROTHER'S ACTS, THE LATTER OCCURRING WHILE REPRESENTING A CLIENT DURING SETTLEMENT NEGOTIATIONS WITH A TEXAS ATTORNEY, VIOLATES PETITIONER'S DUE PROCESS RIGHTS AND CONFLICTS WITH THIS COURT'S HOLDINGS IN *INTERNATIONAL SHOE v. WASHINGTON*, 326 U.S. 310 (1945), *HANSON v. DENCKLA*, 357 U.S. 235 (1958), AND SUBSEQUENT DECISIONS.

1. The Due Process Clause of the Fourteenth Amendment places limitations on a state's ability to subject nonresidents to the jurisdiction of its courts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). As interpreted by this Court, the principal focus of the Due Process Clause is the nonresident's contacts with the forum state. As this Court said in *International Shoe v. Washington*, 326 U.S. 310, 319 (1945):

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in rela-

> tion to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

For more than 40 years this Court has continued to emphasize the contacts of a nonresident defendant. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S.Ct. 2174, 2183 (1985), decided after the Court of Appeals decision in this case, this Court reaffirmed that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." The Texas Court of Appeals ignored this constitutional requirement in asserting jurisdiction over Petitioner.

The Court of Appeals conceded that there was "no evidence that [Petitioner] had direct contacts which would subject him to the jurisdiction of the Texas courts." App. 16. Despite this fact, and without addressing the due process implications of its ruling, the Court of Appeals held that it could assert personal jurisdiction over Petitioner. The Texas Court of Appeals simply stated that asserting jurisdiction did not "offend traditional notions of fair play and substantial justice" (App. 18), because Texas has a special interest in protecting its citizens (*i.e.*, allowing them to file lawsuits in Texas) for alleged violations of securities and consumer laws.[7] That ruling, be-

[7] Oddly enough, the counts of the complaint relating to securities law and consumer law violations had been abandoned at the commencement of the jurisdictional hearing. (Tr. 64). Moreover, it must be remembered that the trial court's ruling did not preclude the plaintiff from filing a suit in Florida if it believed a meritorious action existed.

cause it focuses on the purported interests of the State of Texas—and not on purposeful contacts by the Petitioner—is both erroneous and in conflict with this Court's decision in *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S.Ct. 2174 (1985), which specifies that such factors are to be considered only *after* the court has determined that the nonresident defendant "purposefully established minimum contacts within the forum State." 105 S.Ct. at 2184. Applying the proper standard would require the Court of Appeals to affirm the dismissal of this case as to Petitioner for lack of personal jurisdiction.

This Court should grant review in this case to prevent the application of an improper standard for establishing jurisdiction and to provide guidance to the state courts, which might otherwise continue to misapply the constitutional standards established by this Court. The Texas Supreme Court, by refusing the application for writ of error, has approved of the improper standard adopted by the Court of Appeals. Neither the Texas Court of Appeals nor the Texas Supreme Court paid any attention to the constitutional due process limitations on asserting jurisdiction over a non-resident individual defendant. By eliminating the requirement of purposeful contacts, the Texas courts have greatly expanded the scope of jurisdiction in the state. Indeed, the decision of the Court of Appeals is yet another attempt to establish Texas as the "courthouse for the world." *Hall v. Helicopteros Nacionales de Colombia*, 638 S.W.2d 870, 877 (Tex. 1982) (Pope, J., dissenting), *rev'd*, ____ U.S. ____, 104 S.Ct. 1868 (1984).

In view of the Texas court's failure to apply constitutional principles clearly and repeatedly articulated by this Court, it may be appropriate in this case to vacate the judgment below and remand this case to the Texas Court of Appeals for further consideration in light of this Court's

opinion in *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S.Ct. 2174 (1985), with instructions that it consider the due process implications of the assertion of jurisdiction.

2. The lack of any purposeful contact by Petitioner with the State of Texas cannot be circumvented by looking to the actions of Sidney T. Bernstein. The acts of his brother cannot be transferred to Petitioner for jurisdictional purposes simply because Petitioner was a shareholder in the professional corporation which employed his brother. On numerous occasions, this Court has ruled that jurisdictional contacts cannot be established by the acts of another. *See, e.g., Rush v. Savchuk*, 444 U.S. 320, 332 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, ____ U.S. ____, 104 S. Ct. 1868, 1873 (1984); *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S. Ct. 2174, 2183 (1985). As this Court held in *Hansen v. Denckla*, 357 U.S. 235, 253 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

The uncontradicted evidence demonstrated that Petitioner was not personally present in the State of Texas and had no oral or written communication with anyone in the State of Texas. He had no knowledge or control over his brother's dealings with Respondent. Petitioner was merely a shareholder in a corporate entity which had an employee [Sidney Bernstein] conducting settlement negotiations, on behalf of a client, with a Texas attorney. In these circumstances, there is no basis for the asser-

tion of jurisdiction over Petitioner individually.[8] The fact that any plausible review of the trial court record indicates that Petitioner should prevail at a trial on the merits does not mitigate the injustice of the Texas court's assertion of jurisdiction. The real world benefit of a meritorious defense is lost if a plaintiff can exact a higher settlement value, based on increased costs of defense, by forcing a nonresident individual to litigate in a distant state. This ability is demonstrated by Respondent's settlement with Petitioner's fellow shareholders. (*See* p. 7, *supra*, R. 307).

The allegation that Petitioner and Sidney T. Bernstein were "partners" fails to advance Respondent's case as to jurisdiction. The plain and uncontradicted record evidence is that DiGiulian, Spellacy & Bernstein, P.A., was a professional corporation, not a partnership, and that Sidney T. Bernstein was an employee, not a shareholder, in the professional association.[9] Under the provisions of the Florida Professional Service Corporation Act, a shareholder is not personally responsible for any act committed by a person who is not under his direct supervision and control. *Fla. Stat. Ann.*, § 621.07 (West 1985 Supp.). Moreover, even if the acts of Sidney T. Bernstein could be attributed to Petitioner for purposes of liability, which

[8] Since Respondent already had settled with the law firm of DiGiulian, Spellacy & Bernstein, P.A., suit against Petitioner could only be maintained in his individual capacity.

[9] Respondent's counsel was well aware that the law firm was a professional corporation and did not allege otherwise in the Second Amended Petition. That Petition merely alleged that Petitioner and Sidney Bernstein had held themselves out to be partners and therefore were estopped to deny their partnership. However, that assertion was unsupported as a factual matter. Respondent offered no evidence whatsoever that Petitioner held himself out to be his brother's partner. More importantly, estoppel has no relevance in the jurisdictional context, which is dependent upon actual facts and contacts with the foreign state.

Petitioner denies, they are not transferable for the purpose of establishing personal jurisdiction.[10] *See Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("[J]urisdiction over Rush [a defendant] based solely on the activities of State Farm [another defendant] . . . is plainly unconstitutional. . . . The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"); *Calder v. Jones*, ____ U.S. ____, 104 S.Ct. 1482, 1487 (1984) (activities of another are ascribed to the defendant for jurisdictional purposes only when he is a "primary participan[t]" in the enterprise and has acted purposefully in directing the activities).[11]

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[10] Indeed, the trial court found the actions of Sidney T. Bernstein to be so tenuous as not to support the assertion of jurisdiction over either defendant.

[11] The Court of Appeals, in an effort to avoid the constitutional difficulties and assert jurisdiction over Petitioner, established a burden of proof which requires a defendant to bear the burden and to rebut all possible bases for jurisdiction, even those not alleged or proven by the plaintiff. Placing such a burden on the nonresident defendant violates due process and conflicts with the decisions of numerous federal circuits and state courts of last resort, which hold that the plaintiff bears the burden of establishing a *prima facie* case as to all jurisdictional facts. *See, e.g., Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973); *Rubaii v. Lakewood Pipe of Texas, Inc.*, 695 F.2d 541, 544 (11th Cir. 1983); *Grove Press Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 906 (1st Cir. 1980); *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *Scheuer v. District Court of Denver*, 684 P.2d 249, 251 (Colo. 1984); *Electro Engineering Products Co., Inc. v. Lewis*, 352 So.2d 862, 864 (Fla. 1977); *Chavez v. State of Ind. for Logansport State Hospital*, 596 P.2d 698, 700, 122 Ariz. 560 (1979); *Good Hope Industries, Inc. v. Ryder Scott Co.*, 389 N.E.2d 76, 78, 378 Mass. 1 (1979); *Union Bank v. Ferris*, 587 P.2d 454, 455 (Okla. 1978); *State ex rel. Sweere v. Crookham*, 609 P.2d 361, 363, 289 Or. 3 (1980); *Yarborough and Co. v. Schoolfield Furniture Industries, Inc.*, 268 S.E.2d 42, 43, 275 S.C. 151 (1980); *Schroeder v. Raich*, 278 N.W.2d 871, 874, 89 Wis. 2d 588 (1979).

If jurisdiction over Petitioner is proper, then every shareholder in a corporation is subject to personal jurisdiction, individually, in every state in which any employee of the corporation has contacts. Such an expansion of personal jurisdiction would affect millions of individual shareholders throughout the country, subjecting them to virtually unlimited jurisdiction. Such a result would require all corporate entities to reevaluate, if not drastically alter, their business practices. The enormous expense involved in defending an action in a distant jurisdiction, as evidenced by the case at bar, is enough to alter business practices. In the legal community alone, it will lead to a lack of cooperation with out-of-state attorneys in order to avoid subjecting other attorneys, who have no involvement, to personal jurisdiction in a far away court. Indeed, in light of the Court of Appeals' decision, an out-of-state lawyer representing an out-of-state client would be well advised to not set foot in Texas, and forbid any employee to enter the State of Texas or to communicate with any Texas lawyers on client matters.

If the law on jurisdiction is to be stretched to these lengths, it must be done only after this Court has marked a channel through the treacherous constitutional shoals which thereby would be encountered. The issue raised is important not merely to this case, but will have significant impact on the manner in which corporations and law firms throughout the country conduct their future business.[12] To resolve this important issue, to provide guid-

[12] For example, in the case at bar, DiGiulian, Spellacy & Bernstein, P.A., could have ordered its employee, Sidney T. Bernstein, to conduct meetings and correspond with Portland an its agents only in the State of Florida. Absent prior knowledge of the jurisdictional standards applied by the Texas courts in this case, such an order would have constituted gross professional discourtesy and an embarrassment to the Florida legal community.

ance to the lower courts, and to reverse the decision of the Texas Court of Appeals, which conflicts with the Constitution and prior decisions of this Court, Petitioner's application for a writ of certiorari should be granted.

II.

DUE PROCESS REQUIRES THAT A DEFENDANT BE ALLOWED TO SEEK COMPLIANCE WITH DISCOVERY ORDERS AND ETHICAL STANDARDS WITHOUT WAIVING HIS CONSTITUTIONAL RIGHT TO CONTEST PERSONAL JURISDICTION.

The right of a defendant to be tried only by a court which has competent jurisdiction over his person is a liberty interest protected by the Due Process Clause of the Constitution. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-702 (1982). It is well established that the waiver of a constitutional right must be clear and unequivocal. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 616 F.2d 420, 422 (9th Cir. 1980). Thus, a waiver of the right to contest personal jurisdiction is neither to be presumed nor to be easily found. *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264 (5th Cir. 1983); *see also Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937).

The Court of Appeals found that Petitioner waived his right to contest personal jurisdiction merely by filing two pleadings in the trial court: (1) a response to plaintiff's motion to determine status of counsel, and (2) a motion for sanctions against Respondent based on its refusal to provide court ordered discovery for use at the trial on the merits, which, by court order, was to follow immediately after the jurisdictional hearing. That ruling conflicts with the decisions of state and federal courts and denies

Petitioner his due process right to contest personal jurisdiction. *See, e.g., Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir. 1967); *Majerus v. Walk*, 275 F. Supp. 952, 955 (D. Minn. 1967); *Lomanco, Inc. v. Missouri Pacific Railroad Company*, 566 F. Supp. 846, 849 (E.D. Ark. 1983); *Hasley v. Black, Sivalls & Bryson, Inc.*, 235 N.W.2d 446, 452, 70 Wis. 2d 562 (1975); *Wiles v. Welparnel Construction Company Inc.*, 237 S.E.2d 297, 298, 34 N.C. App. 157 (1977).

Petitioner and the other defendants filed a timely special appearance on June 22, 1981. For over two years, Petitioner and the other defendants attempted to obtain a hearing on their plea to the jurisdiction. During this time Petitioner and the other defendants attempted to limit discovery to the issue of jurisdiction. At Respondent's persistent request, however, the trial court ordered that discovery be extended to cover the merits of the case as well as jurisdiction.

The two pleadings which purportedly created Petitioner's "waiver" were filed shortly before the start of the jurisdictional hearing, when the trial court had ordered that a trial on the merits would follow immediately thereafter. The response to Respondent's motion for determination of status of counsel (which was a request that Respondent's counsel be allowed to testify as well as act as counsel)[13] was filed on September 15, 1983. Petitioner and Sidney T. Bernstein pointed out that the Code of Professional Responsibility contains strict limitations as to when an attorney can both testify and represent a party, and that none of the exceptions applied. *See* Supreme Court

[13] Plaintiff's counsel, James R. Harris, repeatedly had asserted, during the preceding two years, that he would not testify. James R. Harris was the Texas attorney who invited Sidney T. Bernstein to participate in the settlement negotiations with Harris in Harris's Corpus Christi, Texas offices.

Texas, Rules Governing the State Bar of Texas, Art. XII, § 8 (Code of Professional Responsibility) DR 5-102 (1983).

The motion for sanctions was filed on September 19, 1983, based on Respondent's refusal to comply with court ordered discovery. The motion was proper in light of Rule 120a of the Texas Rules of Civil Procedure, which specifically provides that the use of discovery processes does not constitute a waiver of a special appearance. If the right to conduct discovery is to be meaningful, it must include the right to ask for sanctions for non-compliance with discovery. The fact that some of the discovery may have been directed to the merits of the case cannot be deemed to constitute a waiver because: (1) the trial court had ordered discovery on the merits; and (2) the trial court had scheduled the trial on the merits to begin immediately following the jurisdiction hearing if jurisdiction had been found, and, indeed, the court had already impaneled a jury during the course of the jurisdictional hearing.

Under the decision of the Texas Court of Appeals, a nonresident defendant must choose between the right to challenge jurisdiction and the right to prepare an effective defense on the merits.[14] Such a position has never been adopted by any other court, and conflicts with the Constitution, common sense and numerous decisions which provide that once a defendant has properly filed a pleading contesting jurisdiction, the defendant can obtain discovery and file additional pleadings without waiving the jurisdictional issue. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, n.10 (1980); *Majerus v. Walk*,

[14] The effective result of having to make such a choice is to penalize a nonresident defendant for invoking his constitutional right. Such an attempted exaction of a penalty is itself unconstitutional. *See, e.g., United States v. Jackson*, 390 U.S. 570, 582-583 (1969); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968).

275 F. Supp. 952, 955 (D. Minn. 1967); *O'Reilly v. Prat's Travel Agency, Inc.*, 457 So.2d 24, 27 (La. Ct. App. 1984); *American Motors Corp. v. Abrahantes*, 474 So.2d 271, 274 (Fla. App. Ct. 1985).[15] This is simply another attempt by the Texas courts to expand their jurisdiction over non-resident defendants without regard to constitutional rights or principles. *See Hall v. Helicopteros Nacionales de Colombia*, 638 S.W.2d 870, 877 (Tex. 1982), (Pope, J. dissenting), *rev'd*, ___ U.S. ___, 104 S. Ct. 1868 (1984).

This Court should grant this petition for a writ of certiorari in order to establish a uniform rule on the issue of waiver of personal jurisdiction. If federal constitutional rights are to be preserved in the face of judicial activism by state courts seeking to expand their jurisdiction beyond constitutional limits, it is essential that this Court act swiftly and surely in defense of the Constitution. The constitutional right of a defendant not to be sued in a state in which he had no purposeful contacts is a right to which this Court must afford special vigilance and protection. The expansive jurisdictional reach approved by the Texas Court of Appeals exceeds that authorized by this Court and by other state and federal courts. A ruling on this issue is important to parties, and to lawyers, throughout the country. This Court should decide whether forcing an out-of-state defendant to choose between challenging personal jurisdiction and preparing a defense on the merits offends "traditional notions for fair play and substantial

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[15] The Court of Appeals also noted (App. 11) that these two pleadings do not specifically state that they are being filed "subject to special appearance." However, a defendant's due process right cannot be waived by the mere failure of counsel to continually incant certain magic words. *See Burger King Corp. v. Rudzewicz*, ___ U.S. ___, 105 S.Ct. 2174, 2189 (1985) (rejecting "any talismanic jurisdictional formulas"). It is well established that the waiver of a constitutional right must be clear and unequivocal.

justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

CONCLUSION

For all the reasons set forth herein, Petitioner urges that this petition for a writ of certiorari be granted and set down for plenary review. In the alternative, Petitioner asks this Court to remand the case for further consideration in light of the decision in *Burger King Corp. v. Rudzewicz*, ___ U.S. ___, 105 S.Ct. 2174 (1985).

Respectfully submitted,

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APPENDIX

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NO. 81-2210-E

PORTLAND SAVINGS AND LOAN ASSOCIATION	)	IN THE DISTRICT COURT
VS.	)	NUECES COUNTY, TEXAS
SIDNEY T. BERNSTEIN, ET AL	)	148TH JUDICIAL DISTRICT

ORDER SUSTAINING DEFENDANTS' SPECIAL APPEARANCE

On the 19th day of September, 1983, came on for hearing the Defendants', Sidney T. Bernstein and Zayle A. Bernstein, Rule 120(a) Special Appearance and the Court, after considering the evidence, and arguments of counsel and being fully advised in the premises is of the opinion that the Defendants' Special Appearance should be sustained,

It is, therefore, ORDERED:

1. That Defendants Sidney T. Bernstein and Zayle A. Bernstein's Special Appearance is sustained and the Plaintiff, Portland Savings and Loan Association's suit is dismissed for lack of jurisdiction over the Defendants; and

2. That the Plaintiff and the Defendants shall each bear their own costs as incurred to date herein.

SIGNED this 27th day of September, 1983 at 9:45 A.M.

/S/ Max W. Boyer
JUDGE PRESIDING

Plaintiff:

Approved as to form only

James R. Harris
/S/ James R. Harris

Defendants:

Approved as to form only

J. Stephen Walker
/S/ J. Stephen Walker
Attorney for Sidney T. Bernstein
and Zayle A. Bernstein,

NO. 81-2210-E

PORTLAND SAVINGS AND LOAN ASSOCIATION	)	IN THE DISTRICT COURT
VS.	)	NUECES COUNTY, TEXAS
SIDNEY T. BERNSTEIN, ET AL	)	148TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS

The Court hereby enters the following findings and conclusions in the above matter.

FINDINGS OF FACT

1. Plaintiff Portland Savings and Loan Association ("Portland") was a savings and loan association organized and incorporated under the laws of the State of Texas with its principal place of business in Portland, Texas. Subsequent to the filing of this action Portland was merged into and is now known as Charter Savings and Loan Association.

2. Defendant Sidney T. Bernstein was, at all times relevant to the matters in this case, and is a resident of the State of Florida.

3. Sidney T. Bernstein is an attorney licensed to practice law in the States of Florida and Maryland and the District of Columbia, who was, at all times relevant to the matters in this case, practicing law in the State of Florida.

4. Defendant Zayle A. Bernstein was, at all times relevant to the matters in this case, and is a resident of the State of Florida.

5. Zayle A. Bernstein is an attorney licensed to practice in the State of Florida who was, at all times rele-

vant to the matters in this case, practicing law in the State of Florida.

6. Sidney T. Bernstein and Zayle A. Bernstein did not and do not maintain a place of business within the State of Texas or have a designated agent in the State of Texas.

7. DiGiulian, Spellacy & Bernstein, P.A. was at all times relevant hereto, a corporation organized and operated pursuant to the provisions of the Florida Professional Service Corporation Act. West's F.S.A., Sec. 621. DiGuilian, Spellacy & Bernstein, P.A. did not maintain any office or agent in the State of Texas and did not hold itself open for the rendering of legal services to residents of the State of Texas.

8. At all times relevant to the matters in this case, Sidney T. Bernstein's only relationship to the law firm of DiGuilian, Spellacy & Bernstein, P.A. was that of an employee.

9. At all times relevant to the matters in this case Zayle A. Bernstein was a shareholder in the law firm of DiGuilian, Spellacy & Bernstein, P.A.

10. One of the clients of DiGuilian, Spellacy & Bernstein, P.A. for whom Sidney T. Bernstein performed legal services was Legel Braswell Government Securities, Inc.("Legel Braswell").

11. Zayle A. Bernstein did not perform any legal services or provide any advice to Legel Braswell, nor did he supervise or control Sidney T. Bernstein or any other lawyer who did provide legal services to Legel Braswell.

12. During May of 1978 Portland, acting through its President and Chief Executive Officer, Ben Eastland, and employees of Legel Braswell entered into an agreement whereby Legel Braswell agreed to purchase certain Government National Mortgage Association ("GNMA") securities, Portland agreed to purchase certain GNMA securities at a future date, and Portland agreed to deliver certain GNMA securities to Legel Braswell as collateral to insure compliance with Portland's future purchase commitments.

13. Portland was entitled to the return of its collateral in June of 1980, in the event it fulfilled its future purchase commitments.

14. Sidney T. Bernstein first became aware of the May 1978 agreement between Portland and Legel Braswell in August of 1978.

15. In October of 1978 Legel Braswell asked DiGuilian, Spellacy & Bernstein, P.A. to provide legal advice concerning certain demands being made upon Legel Braswell by Portland with respect to various securities transactions between Portland and Legel Braswell.

16. As a result of Legel Braswell's request for legal services, Sidney T. Bernstein participated in settlement negotiations between Portland and Legel Braswell.

17. Sidney T. Bernstein's first contact with any officer, agent, representative or employee of Portland occurred at a meeting arranged by James R. Harris, attorney for Portland, in Boca Raton, Florida on November 2, 1978.

18. Sidney T. Bernstein's sole physical contact with the State of Texas was his attendance at a settlement conference, requested and arranged by James R. Harris, on November 9, 1978, in the offices of Harris, Cook & Browning, attorneys for Portland, in Corpus Christi, Texas.

19. Sidney T. Bernstein's discussions and correspondence with representatives of Portland and all of his contacts with the State of Texas were solely in his capacity as attorney for Legel Braswell, with respect to settlement negotiations between Portland and Legel Braswell.

20. Zayle A. Bernstein had no correspondence or contact with any officer, agent, employee or representative of Portland and no contact with or physical presence in the State of Texas.

21. Sidney T. Bernstein did not, at any time, enter into any contract with Portland.

22. Sidney T. Bernstein did not, at any time, make any knowing, willful and material misrepresentation to Portland upon which Portland could reasonably rely.

23. All of Sidney T. Bernstein's contacts with Legel Braswell concerning the transactions between Legel Braswell and Portland were in his capacity as attorney for Legel Braswell and related to his participation in settlement negotiations between Legel Braswell and Portland.

CONCLUSIONS OF LAW

1. Neither Sidney T. Bernstein nor Zayle A. Bernstein entered into any contract to be performed in whole or in part in the State of Texas.

2. Neither Sidney T. Bernstein nor Zayle A. Bernstein committed any tort in whole or in part in the State of Texas.

3. Neither Sidney T. Bernstein nor Zayle A. Bernstein was engaged in business in the State of Texas and are therefore not subject to the jurisdiction of this Court under the Texas Long-Arm Statute, Vernon's Ann. Civ. Sta., art. 2031b.

4. The assertion of jurisdiction by this Court over Sidney T. Bernstein or Zayle A. Bernstein would be in violation of the due process requirements of the United States Constitution.

SIGNED this 22nd day of October, 1983.

/S/ Max W. Boyer
JUDGE PRESIDING

COURT OF APPEALS

Thirteenth Supreme Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 21st day of February, 1985. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-83-511-CV (Tr.Ct.No. 81-2210-E)

PORTLAND SAVINGS AND LOAN ASSN.,

Appellant,

V.

SIDNEY T. BERNSTEIN & ZAYLE A. BERNSTEIN,

Appellees.

on appeal to this Court from Nueces County, Texas.

* * * * * * * * *

JUDGMENT

On appeal from the 148th District Court of Nueces County, Texas from an order sustaining defendant's special appearance signed September 27, 1983. Opinion by Associate Justice Noah Kennedy. Opinion ordered not published. Tex. R. Civ. P. 452.

The opinion and judgment of November 29, 1984, are vacated and the following is substituted therefore. This cause was submitted to the Court on September 6, 1984, on oral argument, briefs and the record. These having

been examined and fully considered, it is the opinion of the Court that there was some error in the order of the court below. The order sustaining appellees' special appearance is REVERSED and REMANDED for trial on the merits.

Costs of the appeal are adjudged against appellees, SIDNEY T. BERNSTEIN AND ZAYLE A. BERNSTEIN. It is further ordered that this decision be certified below for observance.

* * * * * *

BETH A. GRAY, CLERK

NUMBER 13-83-511-CV

COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * * * * *

PORTLAND SAVINGS & LOAN ASSOCIATION, Appellant,

V.

SIDNEY T. BERNSTEIN AND ZAYLE A. BERNSTEIN, Appellee.

* * * * * * * *

On appeal from the 148th District Court of Nueces County, Texas.

* * * * * * * *

Before Noah Kennedy, J., Paul W. Nye, C.J. & Robert J. Seerden, J.

* * * * * * * *

OPINION ON MOTION FOR REHEARING,

Our opinion of November 29, 1984 is withdrawn and the following is substituted.

This is an appeal from an order sustaining appellees' special appearance entered pursuant to TEX. R.CIV. P. 120a. We reverse and remand for a trial on the merits.

The issues in this case are (1) whether appellees, by their invoking the powers of the trial court, consented to the jurisdiction of that court, (2) whether the trial court acquired, by virtue of TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), *in personam* jurisdiction of appellees, Sidney T. Bernstein and Zayle A. Bernstein, and (3) whether certain evidence was properly excluded.

The undisputed facts are set out here. Appellant, Portland Savings and Loan Association, was a savings and loan association organized and incorporated under the laws of the State of Texas with its principal place of business in Portland, Texas. Subsequent to the filing of this action Portland Savings and Loan Association was merged into and is now known as Charter Savings and Loan Association. Appellee, Sidney T. Bernstein, was, at all times relevant to the matters in this case, and is a resident of the State of Florida. Appellee, Zayle A. Bernstein, was, at all times relevant to the matters in this case, and is a resident of the State of Florida. Appellees, Sidney T. Bernstein and Zayle A. Bernstein, did not and do not maintain a place of business or have a designated agent in the State of Texas. Appellee, Sidney T. Bernstein, made and received telephone calls to and from Texas, sent and received letters to and from Texas, visited Texas and received visitors from Texas.

This dispute arises out of securities transactions between appellant and a Florida corporation, Legel Braswell Government Securities. Among other transactions, appellant gave certain GNMA securities to Legel Braswell for "safekeeping" and as collateral. For reasons not relevant to this appeal, appellant desired the return of these GNMA securities. Appellant then discovered that Legel Braswell had pledged the securities as collateral to a third party, Blyth, Eastman, Dillon & Company. After extensive negotiations regarding the return of the GNMA securities, Legel Braswell filed a petition for reorganization in Bankruptcy Court.

During the relevant times, Legel Braswell was represented by the law firm DiGiulian, Spellacy & Bernstein. Zayle A. Bernstein is the "Bernstein" in the firm name. Sidney T. Bernstein, is Zayle's younger brother and the attorney who handled Legel Braswell's affairs.

Appellant's first point of error asserts that appellees consented to the jurisdiction of the trial court. Appellees

filed a Motion for Sanctions, under TEX. R. CIV. P.170,[1] requesting that the trial court dismiss the cause of action with prejudice. Appellees also sought to have appellant's attorney disqualified in their Response to Motion to Qualify Status. Appellant asserts that these acts invoke the general jurisdiction of the trial court and are not in compliance with TEX. R. CIV. P. 120a.

Rule 120a provides a procedure for making a special appearance "for the purpose of objecting to the jurisdiction of the court over the person ... of the defendant." However, the rule also mandates strict compliance with the procedure. Every appearance, *prior* to judgment, not in compliance with Rule 120a is a general appearance. Estate of Griffin v. Sumner, 604 S.W. 221 (Tex.Civ.App.—San Antonio 1980, writ ref'd n.r.e.); TEX. R. CIV. P. 120a.

Rule 120a also provides that other pleas, pleadings and motions may be filed and, specifically, that the use of the discovery process does not constitute a waiver of the special appearance. TEX. R. CIV. P. 120a. However, these pleas, pleadings and motions must be filed subject to the special appearance. Stegall & Stegall v. Cohn, 592 S.W.2d 427 (Tex.Civ.App.—Fort Worth 1979, no writ); Frye v. Ross Aviation, Inc. 523 S.W.2d 500 (Tex.Civ. App.—Amarillo 1975, no writ). *See* 3 Tex.Jur.3d, Appearance §14 (1980). Upon examination of the Response to Motion to Qualify Status and Motion for Sanctions, we find that neither of these pleadings are filed subject to the plea to the jurisdiction and therefore do not comply with Rule 120a.

In addition, we find that appellees' Motion for Sanctions specifically requests that the trial court "set the Defendants' Motion for Sanctions for immediate hearing and *before any other matter is heard.*" (Emphasis added.) Although when the subject of the discovery is relevant

---

[1] Rule 170 has been repealed, effective April 1, 1984. See TEX. R. CIV. P. 215.

to the jurisdictional hearing, it may be permissible to have a hearing on a motion for sanctions before the jurisdictional hearing, we find, in this case, that it is apparent from the record that the overwhelming majority of the requested discovery could not be relevant to the proof of jurisdictional facts.

When reaching a decision to exercise or decline jurisdiction, the trial court should rely only upon the necessary jurisdictional facts and should not reach the merits of the case. Arterbury v. American Bank & Trust Co., 553 S.W. 2d 943 (Tex. Civ. App.—Texarkana 1977, no writ). TEX. R. CIV. P. 120a. When the plaintiff alleges an action in tort and alleges that the cause of action arose out of an act committed in Texas, the necessary proof is only that the purposeful act was committed in this State. *Arterbury*, 553 S.W.2d at 947.

> Under the "commission of a tort" provisions of a long arm statute, the jurisdictional requirements are met when the defendant, personally or through an agent, is the author of an act or omission within the forum state, and the petition states a cause of action in tort arising from such conduct. The act or omission within the state is a sufficient basis for the exercise of jurisdiction *to determine whether or not the act or omission gives rise to liability in tort.* (emphasis in original)

Arterbury, 553 S.W.2d at 948. Ultimate liability in tort is not a jurisdictional fact, and the merits of the cause of action are not at issue. *Arterbury*, 553 S.W.2d at 948.

By the same reasoning, defenses to the merits are not relevant in a jurisdictional hearing. *Arterbury*, 553 S.W.2d at 948. Therefore, only discovery directed at Sidney T. Bernstein's and Zayle A. Bernstein's "purposeful acts" committed in this state are relevant to the jurisdictional hearing. Because the discovery addressed in the motion for sanctions was directed at the merits of the case and not the jurisdictional hearing, that motion is not in compliance with Rule 120a which requires that the hearing

on the challenge to the jurisdiction must be heard and determined before any other matter. TEX. R. CIV. P. 120a(2). Appellant's first point of error is sustained.

Even though the first point of error is dispositive of this case, we will proceed to address the remaining points.

By its second point of error, appellant complains that the trial court erred in sustaining appellee's plea to the jurisdiction.

Appellant's (plaintiff's) second Amended Original Petition named as defendants Sidney and Zayle Bernstein, individually and as partners. As causes of action, appellants alleged, among other things, violations of securities laws, Consumer Protection statutes, conversion, fraud, misrepresentation, conspiracy to convert securities, conspiracy to defraud and negligence.[2] Appellees (defendants) entered a special appearance pursuant to TEX. R. CIV. P. 120a, asserting that they were not amenable to process under TEX. REV. CIV. STAT. Ann. art. 2031b. Discovery was begun, various motions were filed and the parties indulged in pre-trial maneuvering for more than two years. A six-day hearing on the jurisdictional question was held, producing 1094 pages of statement of facts, 531 pages of transcript and a 2-inch volume of exhibits.

We conclude that the trial court erred in sustaining appellees' plea to the jurisdiction. Article 2031b, the "long arm statute," provides in relevant part:

> Sec. 3. Any foreign corporation, . . . partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State

[2] Appellant orally abandoned some claims in open court; however, this Court is unable to ascertain which claims were abandoned.

> shall be deemed equivalent to an appointment by such foreign corporation, ... partnership, or non-resident natural person of the Secretary of State of Texas a agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.
>
> Sec. 4. for the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, ... partnership, or non-resident natural person shall be deemed doing business in this State by ... the committing of any tort in whole or in part in this State.

In order to determine if the Texas courts can maintain jurisdiction over non-residents, the three-prong "O'Brien" test is applied:

> (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966).

Siskind v. Villa Foundation for Education, Inc., 642 S.W.2d 434 (Tex. 1982). The procedure for testing the propriety of the trial court's assuming jurisdiction when *in personam* jurisdiction is challenged is the special appearance. TEX. R. CIV. P. 120a. In such a proceeding, the burden of producing evidence and the burden of per-

suasion are on the party challenging jurisdiction. Estate of Griffin v. Sumner, 604 S.W.2d 221 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); Roquemore v. Roquemore, 431 S.W.2d 595 (Tex. Civ. App.—Corpus Christi 1968, no writ).

When reaching a decision to exercise or decline jurisdiction, the trial court should rely only upon the necessary jurisdictional facts and should not reach the merits of the case. Arterbury v. American Bank & Trust Co., 553 S.W.2d 943 (Tex. Civ. App.—Texarkana 1977, no writ). TEX. R. CIV. P. 120a. When the plaintiff alleges an action in tort and alleges that the cause of action arose out of an act committed in Texas, the necessary proof is only that the purposeful act was committed in this State. *Arterbury*, 553 S.W.2d at 947; *see also* discussion under the first point of error. Ultimate liability in tort is not a jurisdictional fact, and the merits of the cause of action are not at issue. *Arterbury*, 553 S.W.2d at 948.

In the case before us, it is undisputed that Sidney T. Bernstein committed purposeful acts in the State of Texas by his calls, letters and visit to Texas. Siskind v. Villa Foundation for Education, Inc., 642 S.W.2d 434, 436 (Tex. 1982); *see also* Hull v. Gamblin, 241 A.2d 739, 743 (D.C. App. 1968) (wherein it was said "All representations forming the basis of the suit were addressed to a Texas resident. *All appellant's essential business purposes were carried out in Texas as fully as if she had been present in the state.*" (emphasis added). Moreover, appellant's reliance on the representations of Sidney T. Bernstein occurred in Texas. Read v. Cary, 615 S.W.2d 296, 299 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). *See Siskind*, 642 S.W.2d at 437.

There is also the necessary nexus between Sidney T. Bernstein's calls, letters and visit to Texas and appellant's allegations of misrepresentation, conspiracy, fraud and statutory violations. All of the acts alleged to create liability relate to the ongoing negotiations embodied in the calls, letters and visit of Sidney T. Bernstein. *See Siskind.*

642 S.W.2d at 437. Allegations of misrepresentation and deceptive trade practices arising out of the defendant's contacts with Texas are sufficient to maintain a suit in Texas. *Siskind.* 642 S.W.2d at 437.

By cross-point, appellees argue that these negotiations are privileged under TEX. R. EVID. 408, which provides that evidence of settlement negotiations is not admissible "to prove liability for, or invalidity of, the claim. . . ." However, "[t]his rule also does not require exclusion when the evidence is offered for another purpose. . . ." TEX. R. EVID. 408. The evidence of the negotiations between appellant and Legel Braswell was not admitted to prove the liability for the claim; rather, it was to show the statements which were alleged to be misrepresentations. Appellees' cross-point is overruled.

There is no evidence that Zayle A. Bernstein had direct contacts which would subject him to the jurisdiction of the Texas courts. *Siskind.* 642 S.W.2d 437. However, appellant argues that Zayle A. Bernstein was a partner of Sidney T. Bernstein and that appellees are estopped to deny that they were partners because of their testimony. In addition, there were exhibits entered into evidence, including appellees' letterhead, which did not designate appellees' firm as a corporation or professional association. Appellees respond that DeGulian, Spellacy & Bernstein was a professional association, incorporated under the laws of the State of Florida.

Whether or not the letterhead bore an indication that the law firm was incorporated is not relevant to the determination that the firm was incorporated under Florida law. Appellees submitted a copy of the Florida Professional Service Corporation Act to the trial court which took judicial notice of said statutes. Under this act, the corporate name of a Professional Service Corporation must contain the last names of some or all of the shareholders and the word "chartered," or the words "professional association" or the abbreviation "P.A." However, it is permissible for the corporation to render professional service

under a name which is identical to its corporate name, except the word "chartered," or "professional association" or the abbreviation "P.A." may be omitted so long as the corporation has first registered the name to be so used in the manner required for fictitious names. FLA. STAT. ANN. §621.12 (West 1977). Appellees introduced no evidence that they had complied with this last provision by registering the name of their firm.

Under Texas law, the name of a professional corporation must include one of the following: "corporation," "company," or "incorporated," or an abbreviation of one of these words or the initials "P.C." TEX. REV. CIV. STAT. ANN. art. 1528e §8 (Vernon 1980); TEX. REV. CIV. STAT. ANN. art. 1528e §5 (Vernon Supp. 1984); TEX. BUS. CORP. ACT. ANN. art. 2.05 (Vernon 1980).

A court must look to the intent of the legislature and give effect to that intent. Knight v. International Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982). The purpose of statutes which require the use of particular words in a corporate name is to give notice that one is dealing with a corporation and not an individual and to advise that reliance is not to be placed upon the personal liability of the principals. 18 C.J.S. Corporations §167 (1939). The purpose of the assumed name statutes is likewise to inform the public and give constructive notice of the nature of the business with which they are dealing. 65 C.J.S. Names §9(3)(1966).

Legislative grants of rights and privileges are to be strictly construed. State v. Standard, 414 S.W.2d 148 (Tex. 1967); Texas Employment Commission v. Norris, 636 S.W. 2d 248 (Tex. Civ. App.—Beaumont 1982, writ dism'd); Gilbert v. State, 437 S.W.2d 444 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). Given that the purpose of the above cited statutes is to give notice to the public and that the use of an assumed name is a privilege granted by the Legislature, we hold that strict compliance with these statutes is necessary for appellees to claim the protection of these statutes. In the absence of evidence

of strict compliance with the cited statutes, appellees did not meet their burden of proving that Zayle and Sidney Bernstein were not partners.

Subjecting Zayle A. and Sidney T. Bernstein to the jurisdiction of the Texas courts does not offend traditional notions of fair play and substantial justice. Texas has demonstrated a special interest in protecting its citizens from violations of its securities laws and consumer laws, and in protection of its citizens from the type of activity alleged herein. *Siskind*, 642 S.W.2d at 437. In addition, it is not unreasonable to require a non-resident to defend in this state an action which grows out of the very act which the non-resident committed in this state. *Arterbury*, 533 S.W.2d at 949.

Appellant, by its third ground of error, complains that the trial court erred in failing to allow appellants to use a letter from appellees' attorney as a judicial admission that PX-11 was written by Sidney T. Bernstein.

The fact that appellant ultimately desired to prove was that Sidney T. Bernstein had something to do with the preparation of a letter dated September 21, 1978, signed by Daniel J. Jones and mailed to Ernest & Ernest. At this time, Ernest & Ernest was conducting an audit of the affairs of appellant, Portland Savings and Loan Association. This letter asserts that appellant's securities were held "in safekeeping" and did not disclose that they actually had been transferred to third parties. Appellant alleges that the mailing of this letter constituted the commission of part of the tort of conspiracy to convert appellant's securities in the State of Texas. As stated in point of error two, this proof of a purposeful act committed in the State of Texas (mailing of the letter to Texas) is a fact which would give the trial court jurisdiction over the appellees.

In order to prove that Sidney T. Bernstein had something to do with the letter of September 21, appellants attempted to introduce PX-11, which is reproduced below:

Wed Brunch 5+421 4:00

Securities held in safekeeping

Lou Physical inspection

Registered in Portland

Held

Pledged

Held By First Eastman Dillon

Held in safekeeping

1. Safekeeping ✓
2. Pledge ✓
3. Adjust Trade ✓

GNMA 7,400,000

Sold 8 600,000

Standby option

All material and relevant evidence is admissible. TEX. R. EVID. 401, 402. Evidence is material when there is any rational relationship between the offered evidence and any fact issue in dispute. Evidence is relevant when it has probative value tending to establish the truth of a fact. TEX. R. EVID. 401. We find that, if written by Sidney T. Bernstein, PX-11 would be relevant to the issue of Sidney T. Bernstein's involvement in the drafting of the letter of September 21 and, therefore, would be admissible.

PX-11 was excluded because there was no "predicate laid"; that is, there was not sufficient evidence introduced to support a finding that the document was written by Sidney T. Bernstein. *See* TEX. R. EVID. 901.

A portion of a letter dated February 10, 1982, from appellees' attorney to the Judge presiding at the discovery hearing was offered to show that the document was written by Sidney T. Bernstein. This letter, PX-1/Bill of Exceptions, was written at the request of the Judge in connection with documents tendered for *in camera* inspection. In the letter, appellees' attorney asserts that PX-11 "consists of handwritten notes made by Mr. Sidney Bernstein which appear to relate to a conference with Legel Braswell personnel concerning the dispute with Portland Savings & Loan Association and, as such, constitutes both privileged work product and privileged communications between attorney and client."

A statement made by a person, authorized by a party to make a statement concerning the subject, is not hearsay and is considered an admission by that party. TEX. R. EVID. 801. Appellee asserts that this letter of February 10, 1982, is in some way privileged. There are no privileges except those provided by constitution, statute or rules. TEX. R. EVID. 501. We find no provision for privileged communications with the trial court. Therefore, we find that the letter, PX-1/Bill of Exceptions, should have been admitted by the trial court.

TEX. R. EVID. 103 provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of the complaining party is affected. PX-1/Bill of Exceptions would have provided sufficient evidence to support a finding that the document was written by Sidney T. Bernstein, and thus would have mandated the admission of PX-11 into evidence. PX-11 would have provided sufficient evidence to support a finding that Sidney T. Bernstein had something to do with the preparation of the letter, signed by Daniel J. Jones, dated September 21. This finding would have been sufficient to support the jurisdiction of the court over the appellees. The exclusion of admissible evidence which would support a judgment favorable to appellant deprives appellant of a substantial right.

Appellees assert that the exclusion of this evidence was harmless error. However, as noted above, the exclusion of this evidence was "such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment." *See* TEX. R. CIV. P. 434.

Finally, appellees assert that Sidney T. Bernstein was the attorney and agent for Legel Braswell and, as such, cannot conspire with Legel Braswell, its officers or its agents. We find, however, that this assertion addresses the merits of the case (appellees' liability) and not the jurisdictional fact (the drafting of the letter). *See* Arterbury v. American Bank & Trust Co., 553 S.W.2d 943 (Tex. Civ. App.—Texarkana 1977, no writ). Appellant's third point of error is sustained.

Appellees, by their first cross-point, complain that the trial court should not have permitted the introduction of the testimony of James Wright because the documents used to refresh his memory were not available to appellees.

The documents in question were the records of the Texas Savings and Loan Department. Appellees sought to obtain these documents by serving subpoenas and

notices of depositions on the Texas Savings and Loan Department and its employees. The Attorney General of the State of Texas moved to quash the subpoenas on the ground that the disclosure sought by appellees was prohibited by TEX. REV. CIV. STAT. ANN. art. 852a §11.18 (Vernon Supp. 1984). The presiding judge granted an order to quash. A motion to reconsider was denied by a different presiding judge, and the testimony of Mr. Wright was allowed by yet a third judge.

Appellees also assert that appellants had copies of the documents in question and refused to produce them despite appellees' repeated motions for depositions, requests to the court and orders of the court to produce the documents. Appellees filed a Motion for Sanctions; however, we find no indication that any action was ever taken on this motion. A motion not acted on can furnish no basis for a point of error. State v. Dikes, 625 S.W.2d 18, 20 (Tex. App.—San Antonio 1981, no writ); Fulcher v. Texas State Board of Public Accountancy, 571 S.W.2d 366, 368 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

Appellees assert that they were entitled to review the documents used by Mr. Wright to refresh his memory. TEX. R. EVID. 611 provides:

> If a witness uses a writing to refresh his memory for the purpose of testifying either—
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery

> of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

We hold that, under this rule, it is within the trial court's discretion whether or not to require the production of the documents relied upon by a witness to refresh his memory before testimony.

In addition, we have reviewed Mr. Wright's testimony and find that, for the most part, it is cumulative of other testimony before the trial court, and, therefore, we find no harm to appellees. Appellees' first cross-point is overruled.

Appellees, by their third cross-point, complain that the trial court erred in requiring the production of certain documents, claimed to be subject to the lawyer-client and work product privileges.

Appellees assert that the documents in question include time records, billing statements and hand-written notes prepared by Sidney T. Bernstein and other attorneys. We have reviewed the references to the record in appellees' brief and are unable to locate the documents of which appellee complains. As noted above, the record in the case is extensive. Appellee's brief on this cross-point is insufficient. TEX. R. CIV. P. 418.[3]

Appellees, by their fourth cross-point, complain that the trial court erred in not permitting the appellees to recover their costs.

To be entitled to appellate review of errors raised by a cross-point, appellees must have apprised the court in some manner of their complaints or objections. Visage v. Marshall, 632 S.W.2d 667 (Tex. App.—Tyler 1982, writ

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[3] TEX. R. CIV. P. 418 repealed effective October 1, 1984.

ref'd n.r.e.). Appellees did not give notice to the trial court of their dissatisfaction with the assessment of costs and cannot be heard to complain in this Court. Appellee's crosspoint is overruled.

The order sustaining appellees' special appearance is reversed and remanded for trial on the merits.

NOAH KENNEDY
Associate Justice

Opinion not published.

Opinion delivered and filed this
the 31st day of January, 1985.

CHIEF JUSTICE
PAUL W. NYE

ASSOCIATE JUSTICES
NORMAN L. UTTER
NOAH KENNEDY
ROBERT J. SEERDEN
FORTUNATO P. BENAVIDES
J. BONNER DORSEY

CLERK
BETH A. GRAY

DEPUTY CLERK
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COURT OF APPEALS
Thirteenth Supreme Judicial District
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March 14, 1985

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RE: CASE NO. 13-83-00511-CV
TRIAL COURT CASE NO. 81-2210-E

STYLE: Portland Savings & Loan Association
V: Sidney T. Bernstein & Zayle A. Bernstein

The appellee's motion for rehearing was overruled by this Court on this day.

Respectfully yours,

Beth A. Gray, Clerk

By /s/ Cathy Wilborn
Deputy

CW:ajv

SUPREME COURT OF TEXAS
P. O. BOX 12248
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Austin, Texas 78711
Mary M. Wakefield, Clerk
July 17, 1985

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RE: Case No. C-4151

STYLE: SIDNEY T. BERNSTEIN ET AL.
v. PORTLAND SAVINGS AND LOAN ASSOCIATION

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Barry E. Pickett
Deputy

SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 18, 1985

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RE: Case No. C-4151

STYLE: SIDNEY T. BERNSTEIN ET AL.
v. PORTLAND SAVINGS AND LOAN
ASSOCIATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,
Mary M. Wakefield, Clerk
By /s/ Blanca E. Morin
Deputy

FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Petitioner has misstated the record in formulating Petitioner's issues and, as will be evidenced from the following argument, no issue is presented which warrants granting the Petition.

PARTIES

The names of the parties and their respective attorneys in these proceedings are as follows:

PETITIONER:

ZAYLE A. BERNSTEIN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix, 9-24).

REASONS FOR DENYING THE PETITION

Petitioner simply failed at the hearing to introduce proper evidence which would support the position that Petitioner has taken in his Application for Writ of Cer-

tiorari. Petitioner disregards the fact that the Court of Appeals found that Petitioner introduced no evidence of his compliance with the Florida statute requiring registration of a fictitious name and was therefore estopped to deny that Petitioner was a partner of Sidney T. Bernstein. Further, in complaining to this Court that Petitioner is merely a stockholder of a corporation, Petitioner ignores both the fact that there was evidence of the Bernsteins' partnership and evidentiary findings by the Court of Appeals that Petitioner did not meet his burden of proof to show that he was not a partner of Sidney T. Bernstein. Petitioner raises nothing of a constitutional dimension to attack this finding by the Court of Appeals. As the Court of Appeals held, Petitioner simply failed to meet his burden of proof; Petitioner does not complain that this holding violates Petitioner's right to due process or is not "fundamentally fair". *See Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 24-25 (1981). Consequently, the first issue asserted by Petitioner is not presented by the record of this case.

Petitioner's issue is not only unsupported by the record, but is also contrary to the law. The Federal Courts of Appeal have been consistent in holding that in assessing personal jurisdiction, the courts may look to contacts between the forum and the agents of defendant. See *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (1st Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S.Ct. 71 (1983); *Texas Trading & Milling Corporation v. Federal Republic of Nigeria*, 647 F.2d 300, 314-315 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); and *Gelfand v. Tanner Motor Tours Limited*, 385 F.2d 116, 120-121 (2nd Cir. 1961), *cert. denied*, 390 U.S. 996 (1968).

As to Petitioner's complaint of the Court of Appeals' finding of waiver, "what acts of the defendant shall be

deemed a submission to [a court's] power is a matter upon which States may differ." See *Insurance Corp. of Ireland, Ltd., et al. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099 (1982); and *Chicago Life Insurance Company, et al. v. Bertha R. Cherry*, 244 U.S. 25 (1917).

In the instant case, Petitioner failed to file pleadings subject to the special appearance and requested a hearing on a matter pertaining to the merits before the special appearance was heard. The holding by the Court of Appeals that such acts constituted submission to the court's power does not amount to a denial of due process of law. *Chicago Life Insurance Company, et al. v. Bertha R. Cherry*, 244 U.S. 25 (1917).

CONCLUSION

For the reasons set forth herein the Petition for Writ of Certiorari to the Court of Appeals of Texas should be denied.

Respectfully submitted,

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No. 85-1078

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZAYLE A. BERNSTEIN,

Petitioner,

v.

PORTLAND SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

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PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

Petitioner respectfully submits this memorandum in reply to respondent's brief in opposition. In its brief in opposition, respondent makes only three arguments, each of which totally ignores the merits of the constitutional issues raised in the petition and either disregards or misrepresents the factual record.

1. Respondent first contends (Br. Opp. 1-2) that petitioner cannot raise the constitutional questions presented for review here because he allegedly failed to prove that the law firm of DiGiulian, Spellacy & Bernstein, P.A. was a professional association, a necessary predicate for raising those questions. Respondent's contention is contrary to the record evidence:

(a) At the jurisdictional hearing, petitioner introduced the law firm's articles of incorporation (DX2);

(b) Bruno DiGiulian and Sidney T. Bernstein testified that the law firm was incorporated as a professional association (Tr. 93, 589-590);

(c) Respondent introduced no evidence at the hearing to contest the validity of the law firm's incorporation as a professional association;

(d) Respondent conceded in its First Amended Original Petition that the law firm was a professional association (R. 53-54);

(e) There was no evidence that petitioner was a partner in the law firm or that petitioner had authorized Sidney T. Bernstein to act as his personal agent with respect to petitioner's association with or ownership position in the law firm; and

(f) The trial court ruled, based on the evidence adduced at the jurisdictional hearing, that the law firm was incorporated as a professional association (Pet. App. 4).

In short, there can be no question that petitioner established that the law firm was a corporation. The only conceivable basis for respondent's contrary contention appears, not in the trial evidence or in the findings of the trial court, but in the "finding" of the Court of Appeals that petitioner neglected to show the registration of a fictitious name (Pet. App. 17), a factual matter which was neither alleged nor raised by respondent at the jurisdictional hearing. A defendant certainly cannot be required to rebut factual contentions never raised by the plaintiff. Moreover, in view of petitioner's abundant evidence concerning the corporate nature of the law firm, and in view of respondent's concession concerning that fact (R. 53-54), the "finding" made by the Court of Appeals was simply

a *post hoc* (and transparently inadequate) justification for asserting jurisdiction where it was unsupported by the record. By itself, this "finding" demonstrates a denial of due process.

That the case at bar warrants review by this Court is underscored by this Court's recent grant of certiorari in *Connolly v. Burt*, No. 85-298, which involves a non-resident defendant who was never present in the forum state and whose only contact with that state consisted of responding to a request made by one of its residents. Unlike the non-resident defendant in *Connolly*, petitioner here had *no* contacts whatever with the State of Texas, as both courts below properly found (Pet. App. 5, 16).[1] Thus, the far more extreme assertion of jurisdiction in the case at bar clearly warrants review.

2. As we have previously shown (Pet. 18-22), personal jurisdiction over petitioner cannot be premised solely upon his brother's acts. The agency cases upon which respondent relies (Br. Opp. 2) are wholly inapposite here. Although Sidney T. Bernstein was undoubtedly acting as an agent for his client, Legal Braswell Government Securities, Inc., and may have acted, in his capacity as an employee, as an agent of the law firm, he was not an agent of petitioner.[2] The evidence showed only that Sidney T. Bernstein was petitioner's brother (Tr. 1021).

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[1] The situation in *Connolly* is analagous to that of Sidney T. Bernstein who, in the course of his professional representation of a client, communicated with a Texas attorney and, as a matter of professional courtesy, traveled to Texas to attend a settlement conference requested by the Texas attorney. *See* Pet. 18, 23 n. 13.

[2] Respondent filed a separate action against Legal Braswell and has already settled with the law firm, which originally was named as a defendant in the present case.

No evidence whatever was adduced to show that petitioner had authorized Sidney T. Bernstein to act as his agent. Thus, there is no basis for asserting jurisdiction over petitioner.

3. On the issue of waiver, respondent does not contest any of the factual assertions contained in the petition (Pet. 7-10, 22-23). Lacking any authority for the proposition that a plaintiff may delay a hearing on the question of jurisdiction until the eve of trial on the merits, refuse to provide discovery to the defendant, and refuse to comply with court orders mandating discovery, thus forcing a non-resident defendant to choose between contesting jurisdiction and defending the case on the merits, respondent merely asserts that waiver "is a matter upon which States may differ" (Br. Opp. 2-3). But states may differ on this point only within the limits imposed by the Due Process Clause. The facts of this case demonstrate with abundant clarity that the Texas Court of Appeals, in its effort to make Texas courts "the Courthouse of the World" (*Hall v. Helicopteros Nacionales de Colombia*, 638 S.W.2d 870, 877 (Tex. 1982), (Pope, J. dissenting), *rev'd*, 466 U.S. 408 (1984)), acknowledges no such constitutional limitations. It is the constitutional responsibility of this Court, as it has recognized on numerous occasions, to prevent state courts from improperly asserting personal jurisdiction over non-resident defendants. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

It is respectfully submitted that the petition for a writ of certiorari should be granted and the case set down for plenary review.

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RESPONDENT'S REPLY MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS

Respondent respectfully submits this memorandum in reply to Petitioner's Reply Memorandum in Support of the Petition for a Writ of Certiorari. In the brief in support, Petitioner incorrectly presents the facts of the case.

1. In the brief in support, Petitioner refers to DiGiulian, Spellacy & Bernstein with a "P.A.", designating a professional association, after their name (Brief in Support, p.1). DiGiulian, Spellacy & Bernstein did not use any designation in their firm name (PX-1 and PX-10), but held themselves out as a partnership. Not only did they hold themselves out to the general public as a partnership, but Sidney T. Bernstein testified that DiGiulian, Spellacy & Bernstein was, in fact, a partnership by testifying that he had been designated

as a partner in the law firm (R. 1018); that the tax returns indicated he was a partner (R. 1018); that when he left the law firm, he took the position he was a partner and settled his account with the law firm on that basis (R. 1020 and 1021); and that when he did sever his relationship with the law firm, it was uncontested that he was a partner and his brother did not question that he was a partner (R. 1024).

2. The pleadings certainly put in issue the question of partnership for in Plaintiff's Second Amended Original Petition, suit is brought against "the Defendants Zayle A. Bernstein and Sidney T. Bernstein, individually and doing business as a partnership" and it is alleged in the suit that Defendants "have held themselves out as partners at all times relevant herein and are estopped to deny that a partnership existed between the Defendants".

3. The Court of Appeals stated:

> "Appellees submitted a copy of the Florida Professional Service Corporation Act to the trial court which took judicial notice of said statute. Under this act, the corporate name of a Professional Service Corporation must contain the last names of some or all of the shareholders and the word "chartered," or the words "professional association" or the abbreviation "P.A." However, it is permissible for the corporation to render professional service under a name which is identical to its corporate name, except the word "chartered," or "professional association" or the abbreviation "P.A." may be omitted so long as the corporation has first registered the name to be so used in the manner required for fictitious names. FLA. STAT. ANN. §621.12 (West 1977). Appellees introduced no evidence that they had complied with this last provision by registering the name of their firm."

The Court of Appeals is correct in its decision that there was no evidence that DiGiulian, Spellacy & Bernstein

registered the name in accordance with the Florida law and, accordingly, Appellees failed to meet their burden of proof. There *was* evidence demonstrating (1) the failure of DiGiulian, Spellacy & Bernstein to use the word "chartered" or the words "professional association" or the abbreviation "P.A." in their firm name and there was evidence demonstrating (2) that the firm acted as a partnership and (3) that Zayle A. Bernstein and Sidney T. Bernstein were members of the firm. Therefore, under the pleadings, there was a contest over the issue of partnership and at no time was the issue conceded. The issue beng contested and Appellees failing to meet their burden, the Court of Appeals was correct in its decision.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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